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“ANTI-TRUST” LEGISLATION AND LITIGATION.¹

Twenty-one years ago Congress passed the so-called “Sherman Anti-Trust Law.”

This designation of the law is a misnomer. The law as it stands is not attributable to Senator Sherman, nor is the law properly called an “anti-trust law.”

Senator Hoar says in his Autobiography that this law is called the Sherman Act “for no other reason that I can think of except that Mr. Sherman had nothing to do with framing it whatever.”²

The word trust acquired an unenviable prominence in the eighties and became the familiar and common expression for a combination of competing interests under one management. To-day, and for many years past, the so-called trust in its original sense has become rare, but the expression survives and has assumed a generic significance as indicating and connoting every form of combination of competing interests. The original trust arrangement was, as will be remembered, an arrangement whereby a number of competing manufacturers, individual or corporate, while retaining their individual or corporate identity and their individual or corporate ownership of their respective properties, put into the hands of trustees their respective interests, the trustees being clothed with the right to dictate to the respective competitors the terms on which they should compete, the amount and character of their output and the price at which the output should be sold. The term trust soon became a term of opprobrium and has so remained. The large combinations of capital which now

¹This article, substantially in its present form, was delivered as the “Annual Address” before the American Bar Association, at Boston, Massachusetts, August 30th, 1911.

²Vol. II, p. 363.

exist in various branches of industry have inherited the opprobrium attaching to this term. To call a combination or a corporation a trust is to excite public condemnation and put the combination or the corporation on the defensive.

The statute passed in 1890 by Congress is entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." This law was carefully framed, amended and re-amended and was debated in detail by the ablest lawyers in Congress, some of the ablest lawyers who ever sat in that body, including such men as Senators Edmunds of Vermont and George F. Hoar of Massachusetts. One would have supposed that if ever a statute would prove to be unambiguous, intelligible and enforceable, this would be that statute; yet it is safe to say that no statute ever passed since the foundation of the government has been the subject of more difference of opinion or the cause of more perplexity, both to judges and lawyers, than this same statute. Three times have the justices of the United States Supreme Court been divided in opinion on the question of its construction; twice by a vote of five to four and once by a vote of five to three.

In its latest phase, the question of construction has been the occasion for a most violent and impassioned dissent by the senior justice of the court from the views expressed by the Chief Justice, concurred in by all the associate justices, except the senior justice, who in his dissenting opinion has accused his brethren of judicial legislation and of practically nullifying the will of Congress as expressed in the statute and of reversing their previous decisions.

The reason why the eminent and able lawyers who framed this statute failed in their attempt to enact a law which should be clear and unambiguous, is a reason which inheres in all attempts to provide for a large class of cases by statutory enactment. The principles of the common law grow by a process of organic growth. The law slowly develops and enlarges to meet actual cases and existing situations. The law is made by applying principles of morality and public policy and sound reason to a given state of facts. On the other hand, law-making by legislation must undertake to deal with a vast number of complicated situations thereafter to arise, and must deal with such situations either by very general phraseology which will be dangerous when applied to all possible cases coming within the apparent meaning of the language or else it must go into great detail and deal with the subject matter in its various phases.

With regard to the subject matter attempted to be covered by the Sherman Law, there were peculiar difficulties and dangers.

As I have pointed out on a prior occasion, the requisites of a proper statute are:

(1) That its language should be capable of application to all cases covered by such language construed in its ordinary and natural sense;

(2) That it should be applicable to all persons and corporations coming within its terms without arbitrary discrimination;

(3) That it should be clear and certain in its provisions so that all persons can be guided thereby.

This statute fails to comply with any one of these requisites.

The first section of the Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal."

The phrase contracts "in restraint of trade," as used in the common law decisions, primarily had reference to contracts by which a merchant or manufacturer agreed to sell to a competitor in the same line of business the goodwill of his business, such sale to be accompanied by a covenant on the part of the vendor to refrain from competition. Such contracts were originally held to be void as against public policy because necessarily restraining trade.⁸ Gradually, however, such contracts came to be recognized as valid in cases where the covenant to refrain from competition was limited in time and space so as to be not an unreasonable restriction or as the courts sometimes stated it, a restriction no greater than was necessary in order to protect the vendee in the right to the use of the property purchased by him, or as it was otherwise put, a contract "in partial restraint of trade" as distinguished from a contract "in general restraint of trade." It was with regard to such contracts that the words reasonable and unreasonable came to be used and contracts in reasonable restraint of trade, were sustained by the courts, while contracts which were in unreasonable restraint of trade were condemned by the courts. The test of what is a reasonable or an unreasonable restraint of trade has been gradually liberalized by the courts from time to time until now, as laid down by the Court of Appeals of New

⁸The leading case on this subject is *Mitchell v. Reynolds* (1711) 1 P. Wms. 181.

York in the *Diamond Match Case*,⁴ and by the House of Lords in England in the *Nordenfelt Case*,⁵ a covenant by a vendor to refrain from competition is valid even though practically unrestricted as to time and space, provided it is necessary for the protection of the vendee that an unrestricted covenant should be made.⁶

Manifestly, however, if the statute were to be construed literally as declaring "every" contract in restraint of trade to be illegal and if that phrase were to be construed as meaning that every contract which *actually* restrains trade or competition shall be illegal, not only would it run counter to the common law but it would be practically meaningless and unenforceable. This is clearly pointed out by Judge Lacombe in delivering his opinion in the *Tobacco Case* where he uses the striking and telling example of a contract between

"two individuals who have been driving rival express wagons between villages in two contiguous states, who enter into combination to join forces and operate a single line."⁷

As Judge Lacombe well points out, such combination operates to "restrain an existing competition."⁸ This of course amounts to a *reductio ad absurdum*, the only escape from which is to say, as has been said by some of the defenders of the literal construction of the law, that the law was not designed and will not be interpreted by the courts to apply to trifles. The suppression, however, of competition between two rival expressmen may be as important to a small community as the suppression of competition between two great railroad systems is to a large community.

The objections to Section 1 of this Act were emphatically pointed out by no less a person than President Roosevelt. In his annual message to Congress under date of December 8, 1908, he said:

⁴(1887) 106 N. Y. 473.

⁵L. R. [1894] A. C. 535.

⁶There were, however, other classes of contracts which came within the condemnation of the common law as "in restraint of trade," such as contracts between competitors to regulate prices or to prevent competition among themselves or by rivals. These classes of contracts were held to be illegal as tending to raise prices or to create a monopoly by limiting competition. These classes of contracts were evidently intended to be covered by the statute.

⁷United States v. American Tobacco Co. (1908) 164 Fed. 700, 702.

⁸United States v. American Tobacco Co. (1908) 164 Fed. 700, 702.

"I believe that it is *worse than folly* to attempt to prohibit *all* combinations as is done by the Sherman Anti-Trust Law, because such a law can be enforced only *imperfectly* and *unequally*, and its enforcement works almost as much hardship as good."

The second section of the Act,—with regard to "monopolizing,"—is equally incapable of a literal interpretation or a literal enforcement. This section reads:

"Every person who shall monopolize, or *attempt to monopolize*, or combine or conspire with any other person or persons to monopolize, *any part* of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."

The absurdity of this section if literally construed and enforced is well pointed out by Judge Ward in his dissenting opinion in the *Tobacco Case* in the U. S. Circuit Court:⁹

"As this section prohibits a monopoly of or an attempt to monopolize any *part* of such commerce, it cannot be literally construed. So applied, the Act would prohibit commerce altogether."

The same criticism is forcibly made by Judge Sanborn in delivering the opinion of the court in *Whitwell v. Continental Tobacco Co.*¹⁰

In fact this statute never has been and never can be literally and strictly applied. To so apply it would produce chaos in the business world.

The statute must be applied not according to its language but according to its reasonable meaning or else it becomes the instrument of injustice and of ruin to the mercantile community.

The phrase "restraint of trade" as used by the courts is, as I understand the cases, the equivalent of restraint of competition, that is to say, if free competition be restrained, trade is restrained.

It has been claimed with great insistence that there is a distinction between "restraint of trade" and "restraint of competition," and that the latter is not unlawful except as it results in the former, and if the restraint of competition does not in fact restrain the volume or extent of trade, there is no illegal restraint of trade, and it is further insisted that this distinction has been recognized by the Supreme Court in its recent opinions in the *Standard Oil* and *Tobacco Cases*.

With all due respect for the ability of those who support these views, I am unable to concur in their conclusions.

⁹(1908) 164 Fed. 727.

¹⁰(1903) 125 Fed. 454.

The common-law meaning of "restraint of trade" was certainly "restraint of competition." The numerous cases in the common law courts discussing the validity or invalidity of contracts in restraint of trade turn on the question of whether they reasonably or unreasonably interfere with free competition. As is said in the head-note to the opinion of Mr. Justice Harlan in the *Northern Securities Case*:¹¹

"The Anti-Trust Act has prescribed the rule of *free competition*. * * * The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent the play of *competition* restrains instead of promotes trade and commerce."

It is because the agreements in the *Addyston Pipe Case*,¹² the *Montague Case*,¹³ and the *Swift Case*¹⁴ *restrained competition* that they were held to be in *restraint of trade*, and finally, in the *Standard Oil Case*¹⁵ and the *Tobacco Case*,¹⁶ it is because the combinations in these cases were held to unduly restrain free competition that they were held to be in *undue restraint of trade*.

It is said by Mr. Chief Justice White in the recent *Standard Oil Case*, speaking of the common law decisions:¹⁷

"It is also true that while the principles concerning contracts in restraint of trade, that is, voluntary restraint put by a person on his right to pursue his calling, hence only operating subjectively, came generally to be recognized in accordance with the English rule, it came moreover to pass that contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to *unduly diminish competition* and hence to enhance prices—in other words, to monopolize—came also in a generic sense, to be spoken of and treated, as they had been in England, as restricting the due course of trade, and therefore as being in restraint of trade."

And again:

"The dread of enhancement of prices and of other wrongs which it was thought would flow from the *undue limitation of competitive conditions* caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were

¹¹(1903) 193 U. S. 197.

¹²(1899) 175 U. S. 211.

¹³(1903) 193 U. S. 38.

¹⁴(1905) 196 U. S. 375.

¹⁵(1911) 221 U. S. 1.

¹⁶(1911) 221 U. S. 106.

¹⁷(1911) 221 U. S. 1, 56.

unreasonably *restrictive of competitive conditions*, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."¹⁸

In stating the conclusions of the court, the Chief Justice says:¹⁹

"In view of the common law and the law in this country as to the restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results: (a) That the context manifests that the statute was drawn in the light of the existing practical conception of the law of restraint of trade, because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense."

In the *Tobacco Case*, there was no proof that the volume of trade had been in fact restrained. On the contrary, the proof showed an enormous increase of the volume of trade and a large increase in the number of independent dealers during the existence of the American Tobacco Company, but the court held that there was an intent to restrict or suppress competition and to form a monopoly which rendered the combination obnoxious to the statute as a combination "in restraint of trade."

As one of the counsel who argued the *Tobacco Case* before the Supreme Court, appearing in that court in behalf of the Imperial Tobacco Company of Great Britain and Ireland, I ought to say in justice to myself and in justice to my client so far as it was involved in the conclusion arrived at by the court and in justice to the American Tobacco Company, that I did not regard and do not regard the testimony as justifying the sweeping condemnation announced by the court on the facts, or the decision arrived at by the court, even as to the American Company, much less as to the Imperial Company. I concur, however, fully in the

¹⁸*Ibid.* 58.

¹⁹*Ibid.* 59.

views expressed by the court as to the construction of the statute, as I shall hereafter more fully point out.

Taking it as established that "restraint of trade" means restraint of competition, the necessity of a reasonable construction of the statute is clearly apparent.

While the maxim that "competition is the life of trade" is in a certain sense a correct proposition, yet there is a point at which competition becomes the death of trade. It may well be that two competitors, carrying on business in competition with each other, may engage in such ruinous competition by cutting prices or otherwise that one or the other must necessarily be driven to the wall. Unless therefore one or both of those competitors can protect himself or themselves by a mutual agreement involving the sale of the property of one to the other, or by a combination to regulate prices, one or the other must be forced to the wall and thus practical monopoly will result. Undue competition may thus lead to monopoly while a reasonable regulation or a reasonable arrangement between the competitors may prevent monopoly. A rigid and drastic statute overreaches itself, while a reasonable and just statute, which is readily enforceable, will accomplish beneficial results. Prohibition of all combinations and of all restraint of trade is unwise. Civilization means co-operation; co-operation means combination; combination means restraint of competition.

There has been so much misunderstanding and so much intentional or unintentional misrepresentation of the recent opinions of the United States Supreme Court in the *Standard Oil* and *Tobacco Cases* and so much unjust and unfounded criticism of those opinions as an alleged departure from and repudiation of the previous decisions of the court, that a brief review of the decisions is necessary to a clear understanding of the situation.

The extremists have opened the vials of their wrath upon the court, and sarcasm, abuse and even threats have been freely indulged in by those who inveigh against what they call judicial legislation.

Let us endeavor to consider the history of the litigation calmly and dispassionately and see how far the critics are justified in their attacks on the court. In this review of the decisions, it is well to bear in mind what is said by Senator Hoar,²⁰ as to what was intended by its framers:

²⁰Autobiography, Vol. II, p. 364.

"It was expected that the Court, in administering that law, would confine its operation to cases which are contrary to the policy of the law, treating the words 'agreements in restraint of trade' as having a technical meaning, such as they are supposed to have in England. The Supreme Court of the United States went in this particular farther than was expected. In one case it held that 'the bill comprehended every scheme that might be devised to restrain trade or commerce among the several States or with foreign nations.' From this opinion several of the Court, including Mr. Justice Gray, dissented. It has not been carried to its full extent since, and I think will never be held to prohibit the lawful and harmless combinations which have been permitted in this country and in England without complaint, like contracts of partnership, which are usually considered harmless. We thought it was best to use this general phrase which, as we thought, had an accepted and well-known meaning in the English law, and then after it had been construed by the Court, and a body of decisions had grown up under the law, Congress would be able to make such further amendments as might be found by experience necessary."

The first great legal battle over the meaning and application of the statute took place within two or three years after its enactment and was an attempt to deal with the so-called Sugar Trust and to put an end to a great and growing power of control over one of the necessities of life. The attempt, however, to reach the Sugar Trust was a failure. The Supreme Court held in the *Knight Case*,²¹ that the statute was not intended to

"assert the power to deal with monopoly directly as such; or to limit or restrict the right of corporations created by the states or the citizens of the states in the acquisition, control or disposition of property; or to regulate or prescribe the price or prices at which such property, or the products thereof, should be sold; or to make criminal the acts of persons in the acquisition and control of property which the states of their residence or creation sanctioned or permitted."

The bill in the *Knight Case* seems to have been drawn in such shape as to fail to sufficiently disclose that the Sugar Trust was actually carrying on the business of interstate trade or commerce in the *manufactured product*.

The next great legal battle took place in the *Trans-Missouri Case*²² and the *Joint Traffic Case*,²³ both of which were instituted

²¹(1894) 156 U. S. 1.

²²(1896) 166 U. S. 290.

²³(1898) 171 U. S. 505.

within two or three years after the passage of the Act. It might reasonably have been expected that these cases would settle once and for all what the statute meant and what were its applications and its limitations. Unfortunately the decisions in these cases were but starting points for new uncertainties and furnished *obiter dicta* which have misled the bench and the bar in subsequent cases and which remained until 1911 the source of new perplexities. Both of these cases were decided by a bare majority of the court.

The prevailing opinion in the *Trans-Missouri Case*²⁴ contained *dicta* which were understood to mean that every contract which operated in restraint of trade was invalid under the statute whether such contract was reasonable or unreasonable. The main ground of contention in that case was whether the Sherman Law applied to railroad companies engaged in interstate transportation so far as to prohibit mutual regulation by agreement of rates for transportation. The majority of the court held that it did, the minority of the court dissenting on this proposition. Incidentally the majority opinion as delivered by Mr. Justice Peckham announced the proposition that the Sherman Law applies to all combinations in restraint of interstate or foreign trade or commerce without exception or limitation and that the prohibitions of that section are not confined to unreasonable restraints of such trade or commerce, Mr. Justice Peckham saying in his opinion:

"It is now with much amplification of argument urged that the statute in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in unreasonable restraint of trade while leaving all others unaffected by the provisions of the act; that the Common Law meaning of the term 'contract in restraint of trade' includes only such contracts as are in unreasonable restraint of trade, and when that term is used in the Federal Statute it is not intended to include all contracts in restraint of trade but only those which are in unreasonable restraint thereof. The term is not of such limited significance."²⁵

It was most unfortunate that the learned justice who delivered the opinion of the court used this language which was really an *obiter dictum*. All that was really decided by the court in that case was that a contract to regulate rates made between railroad

²⁴*Supra*.

²⁵*United States v. Trans-Missouri Freight Ass'n.* (1896) 166 U. S. 290, 327.

companies carrying on a public service business as common carriers, exercising public franchises, was against public policy as in restraint of trade and came within the prohibition of the Sherman Law irrespective of the question of whether the rates prescribed were reasonable or unreasonable, or whether the agreement would operate beneficially or injuriously. The circumstance that the combination between the railroad companies was capable of being operated so as to prescribe unjust or unreasonable rates was held to be sufficient to bring it within the intent of the statute, even though the actual operation of the combination was beneficial to the community.

Mr. Justice Peckham, however, followed up his *obiter dictum* by a very emphatic statement which he subsequently enlarged upon in the *Joint Traffic Case*²⁶ and by which he carefully warned against the very construction which was subsequently placed upon these decisions by the profession and by some of the lower courts, and even by the Supreme Court itself in subsequent cases. Thus, in the opinion of Mr. Justice Peckham as delivered in the *Joint Traffic Case*, he says:²⁷

"We also repeat what is said in the case above cited that 'the act of Congress must have a *reasonable construction* or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely some bearing upon interstate commerce and possibly to restrain it.' To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri Case* is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption, and one not called for or justified by the decision mentioned, or by any other decision of this court."

Mr. Justice Peckham further says:²⁸

"In dwelling upon the far-reaching nature of the language used in the act as construed in the case mentioned, counsel contend that the extent to which it limits the freedom and destroys the property of the individual can scarcely be exaggerated, and that ordinary contracts and combinations, which are at the same time most indispensable, have the effect of somewhat restraining trade and commerce, although to a very slight extent, but yet, under the construction adopted, they are illegal.

²⁶(1898) 171 U. S. 505, 566.

²⁷*Ibid.* 568.

²⁸*Ibid.* 566.

"As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good will of a business with an agreement not to destroy its value by engaging in a similar business; and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.

"This makes quite a formidable list. It will be observed, however, that no contract of the nature above described is now before the court, and there is some embarrassment in assuming to decide herein just how far the act goes in the direction claimed. Nevertheless, we might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade.

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri* case as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was entered into for the purpose of enhancing the price at which the vender sells his business."

Mr. Justice Peckham further states the real point decided and the only point decided as follows:²⁰

"The question really before us is whether Congress, in the exercise of its right to regulate commerce among the several States, or otherwise, has the power to prohibit, as in restraint of

²⁰*Ibid.* 568.

interstate commerce, *a contract or combination between competing railroad corporations* entered into and formed for the purpose of establishing and maintaining interstate rates and fares for the transportation of freight and passengers on any of the railroads parties to the contract or combination, *even though the rates and fares thus established are reasonable*. Such an agreement directly affects and of course is intended to affect the cost of transportation of commodities, and commerce consists, among other things, of the transportation of commodities, and if such transportation be between States it is interstate commerce. * * * * *

"Has not Congress with regard to interstate commerce and in the course of regulating it, *in the case of railroad corporations*, the power to say that no contract or combination shall be legal which shall restrain trade and commerce by shutting out the operation of the general law of competition? We think it has."

The learned justice proceeds to discuss at length the nature of the franchises of a railroad, and says:³⁰

"We do not think, when the grantees of this public franchise are *competing railroads* seeking the business of transportation of men and goods from one State to another, that ordinary freedom of contract in the use and management of their property requires the right to combine as one consolidated and powerful association for the purpose of stifling competition among themselves, and of thus keeping their rates and charges higher than they might otherwise be under the laws of competition. And this is so, even though the *rates* provided for in the agreement may for the time be not more than are *reasonable*. They may easily and at any time be increased. It is the *combination of these large and powerful corporations* covering vast sections of territory and influencing trade throughout the whole extent thereof, and acting as one body in all the matters over which the combination extends, that constitutes the alleged evil, and in regard to which, so far as the combination operates upon and restrains interstate commerce, Congress has power to legislate and to prohibit."

In view of these carefully measured statements of Mr. Justice Peckham in the *Trans-Missouri Case* and in the *Joint Traffic Case*, and in view of his express statement that "the Act is to have a reasonable construction," it is difficult to understand the criticism that has been made upon the language of Mr. Chief Justice White in the recent decisions in the *Standard Oil* and *Tobacco Cases*, to the effect that the statute is to be interpreted by the "light of reason."

Furthermore, in the case of the *Northern Securities Com-*

³⁰*Ibid.* 570.

pany,³¹ which, as will be remembered, was a case dealing with the question of restraining trade and commerce between competing railroads, by the device of a holding company, holding a majority of the stock of the two competing companies, the court divided five to four on the question of the illegality of such a holding company, but Mr. Justice Brewer took occasion to say, in concurring with the majority, that he wished to modify his concurrence in the opinion of Mr. Justice Peckham in the *Trans-Missouri Case*, so far as that opinion stated that "every" contract or combination in restraint of trade was within the statute, whether "reasonable or unreasonable." As Mr. Justice Brewer was one of the five justices whose concurrence made up the majority necessary to a decision in the *Trans-Missouri Case*, his expression of opinion in the *Northern Securities Case* made the unfortunate *obiter dictum* of Mr. Justice Peckham the *dictum* of a minority instead of a majority of the court and deprived it of any binding authority in subsequent cases.

Mr. Justice Brewer, in his opinion in the *Northern Securities Case* said:³²

"Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were *reasonable* and fit to be upheld. The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, *unreasonable* and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended."

He further says:³³

"I have felt constrained to make these observations for fear that the broad and sweeping language of the opinion of the court might tend to unsettle legitimate business enterprises, stifle or retard wholesome business activities, encourage improper disregard of reasonable contracts and invite unnecessary litigation."

In view of these emphatic statements of Mr. Justice Brewer, one of the majority in the *Trans-Missouri Case*, in which he expressly repudiates the "reasonable or unreasonable" *dictum*, it is difficult to understand how any one can assert that that *dictum* is

³¹(1904) 193 U. S. 197.

³²*Ibid.* 361.

³³*Ibid.* 364.

binding in subsequent cases on the principle of *stare decisis*, or that to call that *dictum* is sacrilege.³⁴

A brief résumé will be needful of the other decisions of the Supreme Court intermediate between the *Trans-Missouri* and *Joint Traffic Cases* and the latest cases of the *Standard Oil* and the *Tobacco Companies* bearing on the interpretation and application of the Sherman Law to mercantile and manufacturing combinations and contracts.

Two cases decided at the same term of court as the *Trans-Missouri* and *Joint Traffic Cases*, *Hopkins v. U. S.*³⁵ and *Anderson v. U. S.*,³⁶ were decided in favor of the defendants, the opinions in both of these cases being delivered by Mr. Justice Peckham,—the same justice who had delivered the opinions in the *Trans-Missouri* and *Joint Traffic Cases*.

In the opinion in the *Hopkins Case*, Mr. Justice Peckham reiterates the statement that the statute must have a "reasonable construction," and repeats what he had said in the *Traffic cases*.

The famous *Addyston Pipe Case*,³⁷ involved an agreement between a number of rival and competing manufacturers to the effect that there should be no *competition* between them in certain states and territories. It was held that the "*direct, immediate and intended effect*" of the agreement was the "*enhancement*" of the "*price.*"

The agreement contemplated fake bids by the rival competitors and fixing the price at which one of the competitors could obtain the contract desired and below which none of the parties to the agreement was allowed to bid. The agreement would have been held to be against public policy and illegal at common law.

This *Addyston* contract was so flagrantly a violation not only

³⁴The situation after the *Northern Securities Case* was thus forcibly put by the Hon. Simeon E. Baldwin, the present Governor of Connecticut, at the time Chief Justice of that State, in 1904, in his work on "American Railroad Law," on page 16 of the first edition, in a footnote: "That the phrase 'agreements in restraint of trade' was adopted by the framers of the Sherman Act, supposing that it would be given the same construction accepted by the English Courts, see George F. Hoar's 'Autobiography,' II., 364. Mr. Justice Brewer, by whose concurrence in the judgment the decision mentioned in the preceding note (*viz.*, the *Northern Securities Co. case*) was reached, in his opinion approves such a construction as will make the Act applicable only to unreasonable contracts and combinations which are in direct restraint of trade." Judge Baldwin then adds: "It seems probable that this will ultimately be the prevailing view."

³⁵(1898) 171 U. S. 578.

³⁶(1898) 171 U. S. 604.

³⁷(1899) 175 U. S. 211.

of the letter but of the spirit of the Sherman Act that it is difficult to conceive of any combination or conspiracy which could be brought within the Act if that contract were held not to be within it.³⁸

In the very careful, able and elaborate opinion delivered by Judge Taft in this case in the U. S. Circuit Court of Appeals, the authorities on "restraint of trade" at common law are exhaustively reviewed and the distinction is clearly pointed out between valid and invalid contracts "in restraint of trade."³⁹

The case of *Montague v. Lowry*,⁴⁰ was a case where there was a combination of wholesale dealers in tiles, mantels and grates, who conspired to confine the business in California to the members of the combination, by *refusing to sell or deliver* tiles, grates or mantels to any other party in California and who conspired to *raise the prices* of those articles in California markets. The combination was one which would have been illegal at common law as against public policy.

The case of *Swift & Co. v. U. S.*,⁴¹ involved a *combination of independent meat dealers*, who agreed not to *bid against each other* in the live stock markets, to *bid up prices for a few days* in order to induce shipments to the stock-yards, to *fix selling prices* and to that end to *restrict shipments* of meat when necessary, to establish a uniform rule of credit to dealers, and to *keep a black list*, to make *uniform and improper charges for carriage*, and to *secure less than lawful freight rates to the exclusion of competitors*.

Assuming that that was a case of interstate commerce within the meaning of the Sherman Law, as was held by the court, it would be difficult to conceive of any element of a combination for unlawful restraint of trade or of an attempt to monopolize which was lacking in the *Swift Case*.

In the case of *Shawnee Compress Company v. Anderson*,⁴² an agreement of lease had been held by the Supreme Court of the

³⁸The case of *Chattanooga Foundry v. Atlanta* (1906) 203 U. S. 390, was a sequel of the *Addyston Pipe Case*, the action being brought by the City of Atlanta against two of the members of the trust or combination which had been held unlawful in the *Addyston Case*. The only questions really discussed by the court in that case were as to the right of the city to maintain the action and as to the Statute of Limitations of Tennessee.

³⁹(1898) 85 Fed. 271, 282.

⁴⁰(1904) 193 U. S. 38.

⁴¹(1905) 196 U. S. 375.

⁴²(1908) 209 U. S. 423.

Territory of Oklahoma to be void as an unreasonable restraint of trade and as against public policy.

In that case the lessor company had agreed with the lessee company not only to go out of the field of competition and not to enter that field again, but had further agreed "*to render every assistance to prevent others from entering it.*" There were other facts in the case showing that the lease was in aid of a scheme of monopoly on the part of the lessee company, the Gulf Compress Company. It was shown that the lessee company was in the business of leasing and operating competing compresses for the purpose of monopolizing as far as possible the business of compressing cotton in a large portion, if not all, of the cotton raising districts of the United States, and that the lease was procured from the Shawnee Company in pursuance of said scheme, and other leases of other compressors were also secured for like purposes "and that it is the design of the Gulf Compress Company to *increase the charge of compressing cotton.*"

In the lease the Shawnee Company had agreed not only to refrain from competition, but to "*render the 'Gulf Company' every assistance in discouraging unreasonable and unnecessary competition.*" It further appeared from the evidence that the Gulf Company had announced in a letter to the Shawnee Company in effect its purpose to create as far as possible a monopoly of the compressing business.⁴³ It further appeared⁴⁴ that the "Gulf Company was a close corporation which, starting in Alabama, rapidly extended from Alabama to all the cotton growing territory."

The court recognized the principle announced in the *Trans-Missouri* and *Joint Traffic Cases*,

"That the sale of the good will of a business with an accompanying agreement not to engage in a similar business was not a restraint of trade within the meaning of the Sherman Act."

The court said:

"The principle is well understood. The restraint upon one of the parties must not be greater than protection to the other party requires, and it needs no further explanation than is given in *Gibbs v. Baltimore Gas Co.*, 130 U. S., 396. The Supreme Court of the Territory recognized the principle, but said: 'Tested by the general principles applicable to contracts of this character,

⁴³*Ibid.* 433.

⁴⁴*Ibid.* 434.

this agreement is far more extensive in its outlook and more onerous in its intention than is necessary to afford a fair protection to the lessee.'"

The case of *Continental Wallpaper Co. v. Voight Sons*,⁴⁵ was a case of an agreement between a number of manufacturers who organized a *selling company* through which their *entire output was sold to such persons only as would enter into a purchasing agreement by which their sales were restricted*. It was held that the clear effect of this arrangement was to restrain and monopolize.

In each and all of the cases which the court held to be obnoxious to the Sherman Act the contracts or combinations were clearly in "unreasonable" or "undue" restraint of trade, and would have been illegal at common law.

Coming now to a consideration of the recent decisions of the Supreme Court in the *Standard Oil Case* and in the *Tobacco Case*, I submit that the opinions in these cases are in consonance with and not a repudiation of the previous decisions of the court, so far as they distinguish between "reasonable" and "unreasonable" contracts.

In discussing these decisions I wish to once more point out, as I have already stated, that while I regard the opinions of the court, so far as they discuss the construction of the statute, as correct expositions of the meaning and intent of the statute, I do not wish to be understood as concurring in the conclusion of the court as to the facts of the case or as to the application of the statute to the American Tobacco Company or the Imperial Tobacco Company of Great Britain and Ireland, the latter of which companies I represented on the argument in the Supreme Court.

The opinions of Mr. Chief Justice White do not, in fact, use the word *unreasonable* in defining the class of contracts prohibited by the statute, but substitute for that word the word "*undue*" or "*unduly*." The Chief Justice would have been justified by the previous decisions of the courts in using the term "unreasonable." The test, however, as actually laid down by the Chief Justice in his opinions in those cases and concurred in by all the justices except Mr. Justice Harlan, is that contracts are within the statute which *unduly* restrain trade.

It is quite true that this word apparently interjects into the statute a test which the statute itself does not apply. The statute

⁴⁵(1909) 212 U. S. 227.

says every contract in restraint of trade. The court says every contract in undue restraint of trade. By the insertion of this word undue or unduly, however, the statute is made logical, reasonable and enforceable. It is quite true that the test of what is a due or an undue restraint of trade is left an open question which the court must decide in each case as it comes up, upon the facts and circumstances of that case, but the same is true of a vast number of other matters which are the subject of litigation. Where a hard and fast rule cannot be applied, then it is necessary that discretion should be allowed to the courts in determining between what is lawful and what is unlawful, what permissible and what not permissible.

Just what did the Supreme Court hold in the *Standard Oil* and *Tobacco Cases*? And just how would the law read if these opinions were set aside by legislation? Let us test the logic of those who criticise these opinions as judicial legislation by making them read as the critics would have them read.

In the *Standard Oil* Opinion, Mr. Chief Justice White says that the statute

"evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not *unduly* restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, would constitute an interference that is an undue restraint."⁴⁶

And again, the Chief Justice, referring to the second section of the Act, which prohibits monopolizing, says:

"The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an *undue restraint of the course of trade*, all came to be spoken of as, and to be indeed synonymous with restraint of trade."⁴⁷

And again he says that the purpose of the statute "was to prevent *undue restraint* of every kind or nature."

And again, speaking of the remedies to be awarded by the court, he says:

"The fact must not be overlooked that injury to the public by

⁴⁶*Standard Oil Co. v. United States* (1911) 221 U. S. 1, 60.

⁴⁷*Ibid.* 61.

the prevention of an *undue restraint* on, or the monopolization of trade or commerce is *the foundation upon which the prohibitions of the statute rest*, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property."⁴⁸

In the *Tobacco Case*, the Chief Justice says:

"It was held in the Standard Oil case that as the words restraint of trade at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interest by *unduly restricting competition or unduly obstructing the due course of trade* or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., *injuriously restrained trade*, that the words as used in the statute were designed to have and did have but a like significance."⁴⁹

Now, let us eliminate the word *unduly* and substitute *duly* and see how the statute would read:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce (even though it *duly* restrains such trade or commerce) among the several States or with foreign nations, is hereby declared to be illegal."

The absurdity of any such statutory declaration is manifest.

The Chief Justice applies the "rule of reason" to the statute and holds that the statute is to have a "reasonable construction," but in so doing, he simply follows the decision of the court in the *Trans-Missouri Case* and quotes the exact language of Mr. Justice Peckham in his opinion in that case.

Surely, the most extreme champion of literal construction of this Act, would hardly venture to amend the Act, so as to read:

"This Act shall *not* have a reasonable construction,—shall *not* be subject to the 'rule of reason' and shall *not* be interpreted by the 'light of reason.'"

It is urged that this leaves the law uncertain. True; but uncertainty is better than the ghastly certainty of business chaos, which would assuredly result if the law should be enforced according to its language as invalidating and penalizing every combination in actual restraint of trade. Verily, "the letter killeth" in this case.

⁴⁸*Ibid.* 78.

⁴⁹(1911) 221 U. S. 106, 179.

Let us try to understand what literal interpretation and enforcement would mean in practice. It is difficult to arrive at a conclusion on this subject, since the most ultra-radical of the supporters of a literal interpretation are staggered when presented by concrete instances. Take, for example, the most common case of contract in restraint of trade, that is to say, of a contract in restraint of competition, namely a partnership. Two individual dry-goods merchants, competing with each other in interstate business, that is to say, in selling and shipping goods to the various States of the Union, combine and form a firm. Thereby competition is *pro tanto* eliminated. It is at once protested, of course, that that is not a violation of the Sherman Law. But why not? I have yet to hear any satisfactory answer to this question. It is certainly a contract and combination. It is certainly in restraint of competition, and therefore, in restraint of trade. If the statute is to be literally and impartially and thoroughly enforced, then every partnership between individuals engaged in interstate commerce must be enjoined.

So, when several individual competing manufacturers or traders carrying on interstate commerce unite to form a corporation whose stockholders formerly competed in interstate business—that is to say, in restraint of trade? I have yet to hear any intelligible answer to this question. If the statute is to be equally and impartially enforced according to its letter, then every corporation whose stockholders formerly competed in interstate business must be enjoined, and this of course would cover a vast proportion of the manufacturing corporations in the United States.

A fortiori would this be true, where two or more corporations unite to form a third, to whom their properties are transferred, or where one corporation sells its business to another and agrees to go out of business itself.

A thousand similar instances can be suggested as to which the statute if literally construed would apply. What is said by the advocates of a literal interpretation of these instances? What tests do they lay down to discriminate between the cases where the law should be enforced and the cases where it should not be enforced? I have yet to hear any satisfactory answer to this question. Of course, the test cannot be the magnitude of the interests involved, since that at once makes a basis of discrimination based upon considerations on which the judgment of

courts may differ and *ipso facto* makes the law uncertain which they say ought to be certain and not subject to judicial discrimination.

The truth is, and there is no logical escape from the conclusion, that a literal interpretation and an impartial enforcement of the statute would stop the wheels of industry and would paralyze trade.⁵⁰

I cannot believe that if the American people with their hard-headed common sense and sense of justice really understood what is meant by the clamor for a literal interpretation and enforcement of the law, they would tolerate it for a moment. Even on the lowest plane of self-interest, they would object to having the law applied to the thousands of combinations of small capital throughout the country. They may enjoy the slaughter of the Philistines; but they can hardly fall in love with suicide.

The law as interpreted by the Supreme Court has been sufficiently effective to catch some of the biggest fishes, the Beef Trust, the Standard Oil and the American Tobacco Company. The little fishes may well be allowed to escape through the meshes of the net.

After all, the whole basis of our Anglo-Saxon jurisprudence rests upon the discretion and discrimination of the courts, who work out for the community the rules of public policy guided by the light of reason. Better far the discretion of the courts than the discretion of the executive.

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⁵⁰As President Roosevelt forcibly put the situation: "It is a public evil to have on the statute books a law incapable of full enforcement, because both Judges and juries realize that its full enforcement would destroy the business of the country." Annual Message to Congress, 2nd Session, 59th Congress.